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Everything You Wanted to Know About Justice Scalia but Were Afraid to Ask, or Don't Look Now but Justice Scalia's Originalism Approach Is Fatally Flawed

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1. Hello. My name is Arthur Landever, and I'm a professor of law emeritus. I'm going to talk to you today about Justice Scalia. I hope you find my remarks of some value to you. I'd love to engage in discussion with you after my talk, here, by email (arthur.landever@law.csuohio.edu) or by telephone. (687-2331). Perhaps you can convince me I don't know what I'm talking about. I have tried to include a rather detailed bibliography of cases and authorities so that you may take up where I left off, and correct my mistakes, and develop your own thoughts.

2. Be skeptical of my assessment. I'll try to be fair in what I say, but I have a double bias against Justice Scalia. 1-I'm a liberal, so I often prefer different outcomes from the ones Scalia votes for. 2- I was on the receiving end, some time ago, of Justice Scalia's wrath, so I don't particularly like him. So be somewhat skeptical of my evaluation.

3. What do I think of Justice Scalia? It goes without saying that Scalia is a brilliant justice, an important thinker on the current, deeply-split Supreme Court. He identifies himself as an Originalist, and a critic of what he calls the "Living Constitution " school. He's been a hero to lawyers, professors, judges, and law students associated with the Federalist Society. He's less of a hero to lawyers who come before the Court and experience his wrath, and also less of a hero to some of his colleagues, apparently such as Sandra Day O'Connor and Anthony Kennedy. Given the Court's makeup during his tenure, and given his personality, he's not had as significant an impact in Court constitutional decision-making as he might have wished. He may have greater impact now, with the appointments of Chief Justice Roberts and Justice Alito. However, fast coming up is Justice Thomas, whose version of originalism is seen as "more pure."

4. What is my thesis? My thesis is that Justice Scalia's Originalist approach is fatally flawed. Scalia acknowledges that there is no consensus on the Court as to the appropriate method of constititonal interpretation His approach does not recognize the inevitable *centrality* of the culture surrounding any justice, consciously and subconsciously, as the justice serves with his colleagues. Indeed, he puts up a straw man, calling it the "Living Constitution" School, finding it totally subjective, illegitimate and undemocratic. The fact is that Scalia is influenced by present

culture, to a far greater extent than he would care to admit. He concedes that there are justices who do not use his originalist approach who are conscientious. I would suggest David Souter, whose total life focus is on his role as justice. Souter pays homage, to conservative Justice Harlan II in expressing concerns about government and judicial arbitrariness.

Modern culture frames the debate and helps resolve the difficult specific issues in 2007. Should we care which approach or approaches Supreme Court justices use? We should care because an approach often obviously influences or determines outcomes, and you may prefer some outcomes over others. More important, you should care if you want a system embodying the rule of law, assuring workable democratic governance providing meaningful protection of rights for all of us, and a system that we all can believe in. The framers gave us no one way to interpret the Constitution. Some justices, in the past, have sought original intentions of the framers. Madison emphasized the intentions of the ratifiers, as reflective of the "people." Some justices, like Souter, emphasize stare decisis, and the common law process, as a check on the judge. O'Connor, emphasized narrow issue framing. Other justices, like Breyer, stress the justice's role in assuring the workability of the democratic institutions. Still others have seen their role as protecting individuals that the democratic process has left out.

I acknowledge Justice Scalia's originalism does have value, however. 1-It encourages us to give careful attention to the text and structure of the Constitution. We need to do so to grasp the principles arising from Constitution, even if we can't really know the extent to which framers and ratifiers wanted to limit their application to situations of their time. 2-Originalism also recognizes some aspects of evolving culture, especially modern technology. 3-It takes some account of modern social institutions, such as public schools. 4-It takes some account of stare decisis. 5-It takes some account of evolving traditions, at least under limited circumstances. 6-It also, at times, takes account of "practicalities," as in Bush v. Gore.

Justice Scalia acknowledges the great difficulty in fathoming original public understanding. It is an "evil," given its difficulty, but it is a "lesser evil," to him since it is the only legitimate, democratic, rule-based approach, and one far less subjective than the only alternative he sees, nonoriginalism. But I believe the alternatives he poses: originalism v. nonoriginalism, do not comport with the reality of judging cases.

5. Let me raise a number of questions you might want to ask, in getting to know Justice Scalia (although we will spend most of our time looking at his judicial philosophy): Keep these questions in mind as I give my presentation. If I don't cover them, perhaps I'm ducking them, because I don't know the answers. Ask me about them afterwards, or in your emails:

1- How important is a justice's childhood and early education to forming his views? How hard to separate out factors? To weigh nature and nurture? How difficult to assess habits of study and thought.

2- Specifically, how important is Justice Scalia's ethnicity—He's the first Italian-American to sit on the Court? How important is his religion? Incidentally, for the first time, there is a Roman Catholic majority? Are ethnicity and religion off limits? Irrelevant? I think they are, in terms of disqualifying anyone or assessing his or her work on the Court. But they do shed light on our culture, that subject I think is so very important in understanding the judicial process.

3- How important is his educational background, his experience, as law teacher, as lawyer at Jones Day here, his work as lawyer advising the President, in the Office of Legal Counsel of the Justice Department? His interactions with various lawyer associations, including the Federalist Socieity? With students? (He came here some time ago on a visit, perhaps he's been here twice. How important is it how he chooses his clerks and their assignments).

4-What is his approach, called originalism? How pure is it? How many justices on the Present Court are originalists? What are some of the other approaches?

5-What is his contribution to the Court?

6- What will his legacy be?

6. So what is Originalism? How do we know an Originalist when we see one? Why does Justice Scalia say that the approach of Originalism is an "evil," but a "lesser evil," and why does he identify himself as a "faint-hearted" originalist?

1- What is it? According to Justice Scalia, his kind of originalist is a justice who sees his or her task as one of determining the original, public understanding of the relevant constitutional clauses as brought into being by the "people" of the time. Originalism is the only legitimate mandate of the justice since it, alone, is consistent with republicanism, and the rule of law. Nonoriginalism is illegitimate and totally subjective (Scalia distinguishes such an approach from a goal of intentionalism, that is, seeking to ascertain what exactly the framers or ratifiers subjectively intended). Finding the original public understanding is an extremely difficult undertaking, but, to him, the only legitimate one (with some limited exceptions). Obviously, it is very difficult to ascertain original public understanding of words written two hundred or one hundred years ago. But it is easier to do that than to determine framer-ratifier subjective intent of particular individuals. Records are quite incomplete, especially as to ratifier debates as to both the Constitution framed in 1787 and the Bill of Rights, framed in 1789.

2-Originalism is an evil because the judge may not get it right, try as he may, given that it is exceedingly difficult to determine that original meaning. In addition, the judge, being a human being, may feel practical or moral pressures to intentionally get it wrong. Scalia can't abide flogging even if the framers thought it was perfectly respectable. Scalia at times respects stare decisis, as for example, long-standing, New Deal precedent as to the breadth of the commerce clause's "affecting commerce" doctrine. He recognizes practicality too, witness Bush v. Gore. The choice to him was either to have the partisan Florida Supreme Court decide the 2000 Presidential election, or to have the U.S. Supreme Court do it.

3 –Originalism is a lesser evil because the alternative is "the Living Constitution" approach, which sees a modern Brennan, reinterpreting the

Constitution in terms of evolving standards, winding up installing his own values into the Constitution. No matter what the framers and ratifiers thought about cruel and unusual punishment, if Brennan thinks modern America capital punishment is cruel and unusual, so be it, under nonoriginalism. That approach anoints the unelected justice. His mandate to engage in such an approach is illegitimate, undemocratic, and totally subjective.

7. Under "Original Meaning," the justice asks, not what the Eighth Amendment's "Cruel and Unusual Punishment" clause means in 2007, but what it was publicly understood to mean in 1791, at the time of its adoption. Text and structure are the focus. While the justice may uncover the actual intent of the framers and or ratifiers, the focus is on the public understanding, not upon such subjective intent. Public clause *meaning* at the time, not framer-ratifier *intent.* But Justice Scalia, in particular, does not purport to have either a "literal" original meaning approach, or a pure approach. Practicality, precedent, and narrow conceptions of tradition interstitially play their part with him.

8. Why does Scalia consider himself only a "faint-hearted originalist? Long-standing precedent, especially solidified by other government action, present moral values, and practicality soften his inclination to be "pure of heart." 1-Thus, he has not concurred with Thomas, in the latter's greater commitment to get constitutional interpretation right, even if it means systematically overturning long-standing precedent. For example, Thomas is ready to overturn the New Deal Court's "affecting commerce" doctrine. Scalia is apparently not ready. 2-Scalia says that if a state were to pass a public flogging punishment—he apparently would strike down the law, even though the founders did not consider flogging, cruel and unusual punishment in their time. He distinguishes capital punishment, the ultimate punishment, which he would not strike down, because the framers specifically noted its continuation in several places in the Fifth Amendment. Besides, he says that he doesn't expect to see a law calling for public flogging, any time soon, so its constitutionality is a non-issue. 3-Presumably, if the original public understanding of the Fourteenth Amendment permitted racial segregation in the public schools, he, nonetheless, would have a hard time upholding such segregation. He happily reads "equal protection" broadly to proscribe classifications based upon race in public settings. 4-As a practical matter, he believed his colleagues and he had no choice but to resolve the 2000 election, the alternative, as he saw it was the election being determined by the state supreme court of Florida.

9. Who are the originalists on the present Court? Before the new appointments, Justice Scalia considered, that of the nine sitting justices, only he and Thomas were originalists, excluding even the late Chief Justice, William Rehnquist. Indeed, one Originalist author, libertarian Randy Barnett, today, takes away the mantle from Scalia, himself, considering Thomas to be have been the only originalist on the Rehnquist Court.

10. Is it realistic to label justices either originalists or nonoriginalists? I don't think so. Originalism purports to de-emphasize present culture. Yet it is impossible to do so. True, Scalia would acknowledge evolving technology. But what else has been evolving that the justices cannot ignore? What about these? the evolving role of women, the evolving place of public schools, the evolving nature of Presidential campaign spending, the evolving nature of danger to the public posed by ideological terrorists, to name just a few. Scalia may consider himself a "faint-hearted originalist, and observers may consider Thomas more "pure of heart." (But does Thomas's brand of originalism meaningfully explain all his votes? No, even for him, culture (e.g., his view of affirmative action as the paternalism equivalent of traditional race discrimination) plays its part as well.

11. Indeed, culture always surrounds any justice seeking to engage in Constitutional interpretation. That culture has many aspects--*legal-social- and technological.* We see that culture (and political forces at work) obviously during 1-the nominating process (e.g..Frances Allen's failed efforts to be nominated, the successful efforts of Sandra Day O'Connor and Thurgood Marshall), and 2-the confirmation process (Note the Bork and Scalia confirmation hearings) . No surprises there! But present culture also influences 3-the case selection process, 4-the case decision process, 5-the public education process, the 6- evaluation process by bench, bar, the parties, and the general public, and 7-the governmental response to Court decision-making.

Such culture is just like oxygen. It is ever-present, and vital for understanding how justices go about interpreting the Constitution, but we're not always aware of its presence. It plays a crucial role, even for one seeking to identify and apply the original public understanding of the relevant Constitutional provisions.

12. Present culture determines 1-the leeway Congress, under its Article III authority, gives to the Court to choose its docket. (Now that leeway is almost complete)**. It further has an impact upon the decisions made by the Court, in its small-group dynamic, relating to 2-the yearly volume of cases the members choose** (Note the tradition that four justices are needed to determine the Court's docket and that the present docket is the lowest in 50 years. What is the thinking of the four? Smaller role for the Court on certain issues? Time for the new Roberts Court to get its majority act together? **3-the manner and selection of particular cases for review, and 4- the issues (and their framing) to be considered, including choosing which clauses are relevant, and which doctrines are to be considered.** (Immediately after the passage of the 14th Amendment, the privileges and immunities clause was the predominant focus. In recent years, due process and equal protection).**That culture 5-sets the procedural ground rules relating to standing and related requirements.** (The justices decide such rules, not only based upon Article III, general principles of separation of powers, but also based upon the pressures upon lower federal courts)**, 6-affects how the justices see the nature of the roles of men and women** (Even after the passage of the 14th Amendment, and its "equal protection" to "persons," language, Bradwell v. Illinois, 1872, readily rejected a woman's claim for admission to the bar. No justice sitting today would endorse that position. Why not?. Women, long after the passage of the 14th Amendment, were still

considered the "timid" sex, that needed protecting. See Muller v. Oregon. Today, women are readily assigned dangerous roles by the American military.). **7- affects how the justices see the social institutions (**the public schools at the time of the passage of the 14th amendment were in their early stages. The justices will consider the place of such schools today. And not text meaning, but the anti-discrimination principle of equal protection will be focused upon). **8-evolving technology** (all the justices will look at modern technology-- missiles, nuclear weapons, computer hardware and software, biomedical state of the art. It may be, for example, that in years to come, the abortion debate will be reframed, as fetuses may be saved in earlier stages; abortion may move from clinic to pharmacy, and instead of abortion, the new phenomenon will be fetal transfer, either to voluntary human hosts, or to mechanical robotic hosts). **7-how the justices will see their role** (originalist intent of framers- of ratifiers-of leadership, originalist text meaning-fainted hearted vs. originalist pure of heart? common law lawyer--admirer of stare decisis? Admirer of narrow questions? Seeker after workable government? What level of generality, as to which clauses? Chief Justice Marshall displayed diverse emphases as to constitutional interpretation. In *Marbury,* emphasized the nature of a written constitution, internal logic, the specialized skills of a court, and negative consequences otherwise, in reading in the ultimate judicial power, that of judicial review. In *Fletcher*, he opted for a dual basis, text and natural law. In *McCulloch*, he emphasized loose construction (e.g."necessary and proper" means "convenient") future exigencies, and the parade of horrors in a state's taxing the federal bank. In *Ogden*, in dissent, he emphasized the public understanding during the founding period. **8-determine what presumptions and burdens of proof as to case facts, and as to questions of Constitutional meaning (e.g., levels of scrutiny in equal protection contexts) are to be made, 9--which legal canons ought to be recognized, and which should predominate.** (E.g., Is the Congressional qualification list exclusive or may it be added to by the states? How do you interpret silence? How important are the "Federalist Papers"? Is the "power to tax" the power to destroy, or only so, if the Court does not cabin the tax sufficiently? How important is a misplaced comma? If the 2nd through the 8th amendments do not identify which government (federal or state, or both) is to be restricted, how should the Court decide? How important is stare decisis? If there are two plausible constructions of a statute, which should the Court choose? When the Court looks at a problem, what camera focus-broad or narrow, current situation or what happens next—should the Court use? How should the Court choose among different lines of authority? Should the Court begin with first principles, or with the fact situations arising from relevant holdings? **The culture then affects 10-how the justice sees the exigencies or the nature of the problem, and the consequences of particular ways of dealing with the problem.** (Marshall, in *McCulloch*, found that the state tax on the national bank was the power to destroy. Hughes, in *NLRB*, found that a national steel strike would be catastrophic. Story, in *Martin*, found that diverse state interpretations of the Constitution were intolerable. Scalia, said later as to *Bush v. Gore*, that the reality was that a partisan Supreme Court of Florida was going to decide the Presidential election, and that the U.S. Supreme Court had no choice but to intervene to stop it. In issues involving the "War on Terrorism," the justices will try to assess the nature of this new war we are in, the deference they are willing to give to the President in terms of what is needed, the place of Congress, and the realistic minimum in order to assure basic

constitutional rights. **11-how the justices are to meet, how they are going to use assistance, and how they are going to resolve the issues, 12-how they are going to communicate their decisions to the parties, the bench, and bar, other elites, and the public. 13-how the justices are to see the role of lawyer organizations and advocacy groups and their participation in them.** How significant is it that the Federalist Society has a substantial budget, has thousands of members, sees the justices interact with the organization? (This is not to suggest, at all, that such groups are not improper. They certainly are quite appropriate. And the justices have every right to associate with organizations on different parts of the spectrum. But that interaction, and the development of lawyers and judges with particular ideologies obviously represents the influence of culture upon judicial decision- making. Query, how significant is it that it was in the 1980s that a movement started to shift originalism away from its troubled "intent" moorings (key intents oframers and ratifiers being so difficult to ascertain) and and adopted an original "public meaning" stance?). **13-In sum, the justices, in our culture, (1) must make sound judgments as to matters of legitimate, principled guidance from text, (2) have an real understanding of the circumstances, and (3) seek to exercise their important role in our system, taking account--from my value perspective--of the key principles of fairness and equality in that context.**

13. Scalia has been conscientious about attempting to apply his "faint-hearted originalism, as indicated by his joining in positions that he personally opposed (e.g., voting to overturn convictions because of free speech interests, or finding violations of search and seizure or 6th Amendment rights of physical confrontation). But by and large, there is no denying that most of his votes are consistent with what might be viewed as Hamiltonian conservativism: (strong, unitary Presidency and broad construction of Presidential war-making powers--except as to Americans on American soil--broad national economic power in the Congress, federalism principles assuring viable state power, deference to government in most criminal contexts, importance of protecting individual property rights).

14. Conclusion. I do not deny Justice Scalia's valiant efforts to vote based upon his originalist principles. But both a justice and an observer are well advised to understand the implications of the culture surrounding the Supreme Court. Originalism, in assuming present culture plays little part, and in seeking to operate in a closed universe, distorts the reality of judicial decision-making, and to that extent, risks unsound constitutional interpretations.

15. An afterthought: There is an assumption in the land that our constitutional amending process is alive and well, and therefore, there is no legitimate need for justices to take account of modern culture, modern needs, or modern applications, in construing the Constitution. The reality is far different. Since the passage of the 14th Amendment, about 140 years ago, the only extensions of individual rights, have been in the area of suffrage. Indeed, the only reason that the 13th Amendment, prohibiting slavery, was adopted, (in 1865)was that the Southern states were still outside the Union. As to the 14th Amendment, submitted, in 1866, following the Civil War, the Southern states were told, by Congress, in no uncertain terms,

"Either have your state legislatures approve it, or we will not permit your representatives back into Congress." What is the significance of the failure since 1868 to adopt amendments to expand rights (outside the suffrage context)? The amending process is too difficult? There has not been a strong enough felt need? The Courts have been accepted in their new role in flexibly interpreting the 14th Amendment? If the latter, is that a good enough reason to continue to employ such flexible interpretation?

Supreme Court Cases

Bradwell v. Ill, 83 US 130 (1872) (state denies woman law license despite passage of the 14th Amendment's equal protection clause. Three concurring justices say woman's role in the home is God's will)

Brown v. Board of Education, 347 US 483 (1954) (state enforced school segregation law is struck down, as violating equal protection, especially given the reality of feelings of hurt, the role of public education in 1954, and the inconclusiveness of framer intent).

Bush v. Gore, 531 U.S. 98 (2000) (At least in the 2000 Presidential election situation, if no other election, state recount based upon arbitrary standards violates equal protection. Concurrence provides additional ground that recount interferes with state"legislature's determination of electors. Scalia, in off-hand comments later says he saw the case as one calling for the U.S. Supreme Court to stop the partisan Florida Supreme Court from deciding a Presidential election).

Civil Rights Cases, 109 US 3 (1883) (John Marshall Harlan dissenting) (private race discrimination does not violate the 13th or 14th Amendment))

Coy v. Iowa, 487 U.S. 487 U.S. 1012 (1988)(Scalia majority in leading the liberals) (right to confront witnesses)

Cumming v. Richmond County Board of Educaiton (1899), 175 U.S. 528 (John Marshall Harlan majority) (The Court rejects a challenge to public school racial segregation, given the procedural context)

Dickerson v. United States, 530 U.S. 428 (2000 (Scalia dissenting) (CJ Rehnquist emphasizes *stare decisis* in retaining Miranda)

Dred Scott v. Sandford, 60 U.S. 393 (1856) (blacks cannot be citizens) (Both an originalist search for the status of blacks in 1787 and the beginning of substantive due process doctrine)

Fletcher v. Peck, 10 US 87 (1810) (CJ Marshall Ct opinion) (land swindle and contract clause. The Court opinion rejects the state's effort to repeal the deal, both on impairment grounds and on grounds of natural law).

Gonzales v. Raich, 545 U.S. 1 (2005) (Scalia concurring) (Scalia accepts "substantially affects" doctrine, and apparently New Deal caselaw regarding it)

Grutter v. Bollinger 539 U.S. 306 (2003)(Scalia dissenting) (affirmative action, on an individualized basis, in public law school context is upheld, at least for 25 years, as not a quota system).

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (Scalia dissenting, with Stevens) (During "War on Terrorism," American citizen detained in United States without trial) (Scalia says the detainee is entitled to be tried or freed, absent suspension of the writ).

Hudson v. McMillian, 503 U.S. 1 (1992) (prisoner beating)(Scalia is persuaded to

join Thomas's reading of cruel and unusual).

Kyllo v. United States, 533 U.S. 27 (2001)(Scalia majority opinion for the liberal wing) (thermal imaging without warrant)

Lawrence v. Texas , 539 U.S. 558 (2003)(Scalia dissenting) law prohibiting consensual gay sex in private offends due process)

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)(Scalia majority, in part) (standing)

Marbury v. Madison, 5 U.S. 137 (1803) (C.J. Marshall Ct opinion) (federal judiciary has the implied power of judicial review, taking account of the nature of a writing, the specialized nature of a court, logic, and the consequence of the alternative).

Martin v. Hunter's Lesse 14 US 304 (1816) (Land dispute concerning former Loyalist land after American Revolution) (Story considers the consequence of diverse state positions on the interpretation of the federal constitution)

Md v.Craig, 497 U.S. 836 (1990) (Scalia joins the liberals in dissenting) (right to confront witnesses)

McCulloch v. Maryland, 17 US 316 (1819) (CJ Marshal Ct opinion) (Congress creates national bank which is taxed by the state) (Congressional power is read broadly, necessary and proper is read to include "convenient," the Constititon is to be construed flexibly so that Congress is able to deal with future exigencies, and the Court considers the consequence of allowing states to tax a national instrument. Query, whether rights should be interpreted flexibly too, so that persons in the future are protected in the future, despite exigencies occurring?).

Morrison v Olson, 487 US 654 (1988 (Scalia dissenting, given the express authority of the President under Article II) (Independent counsel law).

Muller v. Oregon, 208 U.S. 412 (1908) (Court upholds maximum hours law for women laundry workers, with an assist from Louis Brandeis's sociological data).

NLRB v. Jones & Laughlin 301 US 1 (1937) (steel strike threatened) (Court considers the "catastrophic" consequence of a national steel strike).

Ogden v. Saunders, 25 US 213 (1827)(CJ Marshall dissenting) (contract impairment). (Marshall speaks about an originalism which takes into account the public understand of the time of the framing).

Ohio ex rel Garnes v. McCann, 1871 Term, 21 Ohio State 198 (State supreme court upholds state law which calls for racial segregation in pubic schools)

Oregon v. Smith, 494 US 872 (1990) (Scalia majority) (state law punishing peyote use is subject to rational basis review)

Parents Involved in Community Schools, v. Seattle, 127 S. ct. 238 (2007) (school assignments based on race violate 14th Amendment equal potction, consistent with Brown's "colorblind" principle)

Planned Parenthood v. Casey, 505 U.S. 833 (1992)(Scalia dissenting) (state regulations of abortion) (*Stare decisis* is key to maintaining the "central holding" of Roe. Justice Souter, one of the three writing the "joint opinion," generally emphasized that approach, in identifying with Justice Harlan, and his concern about judicial arbitrariness. See Toobin, 44-45).

Plessy v. Ferguson, 163 US 537 (1896) (John Marshall Harlan dissenting) (state law imposing race segregation on railroad does not violate the 14th Amendment. Harlan says Constititon is "colorblind" and knows no classes in protecting civil rights. He takes judicial notice ("Everyone know") that purpose of the law was to keep blacks away from whites.

Printz v. United States, 521 U.S. 898 (1997)(Scalia majority opinion) (Court rejects federal law requiring sheriffs to do gun background checks as commandeering of states

and interfering with Presidential authority)

Roper v. Simmons, 543 U.S. 551 (2005) (Scalia dissenting) (Court rejects execution of juvenile as cruel and unusual punishment)

Texas v. Johnson, 491 U.S. 397 (1989) Scalia joins majority as Court strikes down state law punishing the burning of the American flag).

Texas v. White, 74 US 700 (1869) (the nature of the Union was indivisible. States could not secede from it)

Trop v. Dulles 356 US 86 (1958) (Given evolving standards of decency, American citizenship could not be lost by wartime desertion).

Troxel v. Granville, 530 U.S. 57 (2000) (Scalia dissenting) (A mother's rights to custody trumped those of the child's grandparents)

United States v.Lopez, 514 U.S. 549 (1995)(gun possession in school area) (Scalia does not join in Thomas's concurrence which challenges "affecting commerce"doctrine).

Some Current Issues

1. Baze v. Rees: Is capital punishment by lethal injection "cruel and unusual punishment?

2. Indiana Democratic Party v. Rokita: Does photo ID law to vote vioalate voting rights, especially of poor and minorities?

3. Boumediene v. Bush: Can individuals detained in Guantanamo Bay challenge their status in federal court?

4. U.S. v. Williams: Does criminalizing the promotion of child porn violate free speech?

5. District of Columbia v. Heller: Under the Second Amendment, can the District of Columbia ban handguns, but not rifles and shotguns?

6. Does capital punishment for rape of a child constitute "cruel and unusual" punishment?

Bibliography

Jack Balkin, "Abortion and Original Meaning," at Gerhardt, 306. (He speaks of originalism in the sense of *original expected applications*. "Original expected applications ask how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense along with any legal terms of art...Scalia's faint-heartedness is required precisely because he has chosen a[n] unrealistic and impractical principle of interpretation."

Randy E. Barnett, "Scalia's Infidelity: A Critique of 'Faint-Hearted' Orginalism, 75 U. Cin. L. Rev. 7 (2006). (A libertarian originalist, he finds that Scalia is not faithful to originalism. "[He] is willing to ignore the original meaning of those portions of the Constitution that do not meet his criteria of the rule of law as the laws of rules [e.g., Ninth Amendment]. [H]e is willing to avoid objectionable

outcomes that would result from originalism by invoking the precedents established by the dead hand of nonoriginalist justices. [New Deal precedents like "affecting commerce] ..[W]here precedent is unavailing as an escape route, he is willing simply to abandon originalist results that he and most others would find too onerous by some unstated critiera"[e.g. statte flogging law].

Raoul Berger, Government by Judiciary—Transformation of the 14th Amendment 1977

William Brennan, "The Constitution of the United States: Contemporary Ratification," 27 S. Tex. L Rev 433 (1986) ("It is arrogant to pretend from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions... [T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

Stephen Breyer, Active Liberty--Interpreting Our Democratic Constitution 2005 "The judge should read constitutional language "as the revelation of the great purposes that were intended to be achieved by the Constitution", itself, " a framework for and a continuing instrument of government." (17-18). "[T he more 'originalist' judges cannot appeal to the Framers themselves in support of their interpretive views. The Framers did not say specifically what factors judges should take into account when they interpret statutes or the Constitution." (117). And See Toobin, below, 303. There is "no way of knowingly precisely what the framers meant by such phrases as *freedom of speech* or *due process of law*, much less how the they would have applied those terms today. Scala and Thomas's approach, Breyer wrote, has "a tendency to undermine the Constitution's efforts to create a framework for democratic government..." Since the framers did not want their own intentions to bind the future, Scalia's approach can be defended only in practical terms. To Breyer, pragmatic judges are less subjective, than originalists, being more cautious, incrementalist, and concerned about their decisions' impact. See Rosen, at 217, below.

John Hart Ely, Democracy and Distrust—A Theory of Judicial Review (1980).

Daniel A. Farber, "The Originalism Debate: A Guide for the Perplexed, 49 Ohio St. L.J. 1085 (1989)

David Forte, Senior Editor The Heritage Guide to the Constitution, 2005 (The Originalist Perspective 13-17)
"Originalism, in its various and sometimes conflicting versions is today the dominant theory of constitutional interpretation [A]s complex as an originalist jurisprudence may be, the attempt to build a coherent nonoriginalist justification of Supreme Court decisions (excepting the desideratum of following *stare decisis*, even if the legal principles had been wrongly begun) seems to have failed." (13-14).

Originalism "comports with the nature of a constitution...supports legitimate popular government that is accountable...accords with the constitutional purpose of limiting government.....limits the judiciary...comports with the understanding of what our Constitution was to be by the people who formed and ratified that document...[and] is not result-oriented." (14-15).

Gerhardt, Griffin, and Rowe (eds), Constitutional Theory: Arguments and Perspectives 3d Edition, (2007).

Michael K J. Klarman, "Antifidelity," 70 S. Cal. L. Rev. 381 (1997)

Merida & Fletcher, Supreme Discomfort—The Divided Soul of Clarence Thomas, Court (2007)

Caleb Nelson, Originalism and Interpretive Conventions , 70 U. Chi. L. Rev. 519 (2003)

Michael W. McConnell, 81 Va. L Rev. 947 (1995). "Originalism and the Desegregation Decisions, "(See Jeffrey Rosen, below, at 217, 257 Scalia's religion, state action, and affirmative action positions are not consistent with text or originalism)

Richard Posner, "What Am I? A Plotted Plant? The Case Against Strict Constructionism", New Republic, September 28, 1997, at 23-25

Jeffrey Rosen, The Supreme Court—The Personalities and Rivalries that Defined America (12006)

Antonin Scalia, "Originalism: The Lesser Evil," 57 Cin. L Rev. 849, 852-854, 856, 861, 862, 864, 865 (1989). Judges have often decided cases "not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean." Only recently, though, have the judges 'overtly" said that was what they were doing, often "[trott]ing out John's Marshall's statement in *McCulloch v. Maryland* that 'we must never forget it is a *constitution* we are expounding'--as though the implication of that statement was that our interpretation must change from age to age. But that is a canard. ...Nothing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes [except through the reasonable implication of judicial review. Central to that undertaking is the assumption of a 'law' with] a "fixed meaning ascertainable through the usual devices familiar to those learned in the law. [T]rue it is often exceedingly difficult to plumb the original understanding...[T]he most serious objection to originalism in its undiluted form, at least , is [that it is] medicine that seems too strong to swallow. Thus almost every originalist would adulterate it with the doctrine of *stare decisis*...But *stare decisis* alone is not enough to prevent originalism from being what many would consider too bitter a pill. What if some state should enact a new law

providing public lashing, or branding of the right hand, as punishment for certain criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court judge has specifically disapproved them, I doubt whether any federal judge, even among the many who consider themselves originalists, would sustain them against an eighth amendment challenge."... [In a crunch, I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging. But then I cannot imagine such a case's arising either."The central practical effect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what , precisely, is to replace original meaning, once that is abandoned....We do not yet have an agreed-upon theory for interpreting statutes, either."

Antonin Scalia, A Mater of Interpretation: Federal Courts and the Law (1997)

Antonin Scalia, The Rule of Law as a Law of Rules," 55 U of Chi. L Rev. 1175 (1989)

David A. Strauss, Common Law Constitutional Interpretation," 63 U. Chi. L. Rev. 877 (1996)

Jeffrey Toobin, The Nine—Inside the Secret World of the Supreme Court (2007)

David Von Drehle, Inside the Incredibly Shrinking Role of the Supreme Curt. And Why John Roberts is O.K. with That. The Justices haven't found much common ground—but that's the deadlock conservatism Roberts actually wants. Time Magazine, October 22, 2007

Keith E. Whittington, The New Originalism," 2 Geo. J.L. & Public. Poly 599 (2004)